



## **FACTUAL HISTORY**

This case has previously been before the Board. OWCP accepted that on October 11, 2004 appellant, then a 34-year-old transportation security screener, sustained several lumbar spine injuries due to lifting a large bag. Appellant stopped work on January 2, 2005 and received compensation from OWCP for periods of disability. On November 3, 2008 appellant's vocational rehabilitation counselor advised OWCP that she returned to full-time work on that date as an enrollment counselor with a private-sector employer, the University of Phoenix.

On November 20, 2008 the employing establishment advised OWCP that appellant had \$579.64 in weekly pay comprised of \$535.60 in wages, \$10.64 in night differential pay and \$33.40 in Sunday premium pay and that she had \$1,205.10 in annual holiday pay in the year prior to her injury. On April 21, 2009 various payment history sheets and other documents were added to the record. In a fiscal payment worksheet completed on April 21, 2009, it was reported that appellant's pay rate was incorrect from January 18, 2005 to November 2, 2008 and that she was paid \$847.36 per week, when she should have been paid \$604.91 per week.

In an April 24, 2009 letter, OWCP advised appellant of its preliminary determination that she received a \$39,952.01 overpayment of compensation during the period January 18, 2005 to November 2, 2008 because she received compensation based on an incorrect pay rate. It also made a preliminary determination that appellant was at fault in creating the overpayment because she knew or reasonably should have known that she was receiving compensation based on an incorrect pay rate. In another April 24, 2009 letter, OWCP advised appellant of its preliminary determination that she received a \$2,007.14 overpayment of compensation because she continued to receive compensation after she returned to work effective November 3, 2008. It also made a preliminary determination that appellant was at fault in creating the overpayment because she was reasonably aware that she could not accept dual benefits after returning to work.

In a May 27, 2009 decision, OWCP found that appellant received a \$39,952.01 overpayment of compensation because she received compensation based on an incorrect pay rate and that she was at fault in creating the overpayment, thereby precluding waiver of the overpayment. Regarding the finding of fault, it determined that appellant had been advised in an April 21, 2005 letter that she was receiving compensation for total disability and she knew or should have known that she was not entitled to receive compensation at an incorrect weekly amount for the period in question.<sup>2</sup>

In another May 27, 2009 decision, OWCP found that appellant received a \$2,007.14 overpayment of compensation and that she was at fault in creating the overpayment, thereby precluding waiver of the overpayment. Regarding the fault determination, it determined that appellant had been advised in an April 21, 2005 letter that she was receiving compensation for total disability and noted that after she returned to duty on November 3, 2008 she knew or should have known that she was not entitled to compensation for total disability for the period in question.<sup>3</sup>

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<sup>2</sup> OWCP requested that appellant make arrangements to repay the \$39,952.01 overpayment.

<sup>3</sup> OWCP requested that appellant make arrangements to repay the \$2,007.14 overpayment.

By order dated April 13, 2010, the Board reversed the May 27, 2009 decisions of OWCP.<sup>4</sup> The Board found that OWCP did not provide adequate facts and findings regarding how the claimed \$39,952.01 and \$2,007.14 overpayments of compensation were created.

The record contains an OWCP fiscal payment worksheet completed on June 13, 2014 in which it was reported that appellant was paid based on a weekly pay rate of \$847.36 for the period January 18, 2005 to November 2, 2008. The worksheet also contains a calculation regarding how much appellant would receive for the period January 18, 2005 to November 2, 2008 if the payments were based on a weekly pay rate of \$604.62 per week. It was noted, without explanation, that appellant was only entitled to a weekly pay rate of \$604.62 per week. The document lists appellant's date-of-injury pay rate as \$13.39 per hour, and lists night differential as \$10.64 per week, Sunday pay as \$33.40 per week, and holiday pay as \$23.18 per week.

In an October 30, 2014 letter, OWCP advised appellant of its preliminary determination that she received a \$39,904.20 overpayment of compensation during the period January 18, 2005 to November 2, 2008, noting that she was paid compensation for this period "using the incorrect weekly pay rate of \$847.36 instead of the correct weekly pay rate of \$604.62, after returning to work on November 3, 2008."<sup>5</sup> It also made a preliminary determination that appellant was at fault in creating the overpayment because she knew or reasonably should have known that she was receiving compensation based on an incorrect pay rate. OWCP advised appellant that she could request waiver of recovery of the overpayment and that she could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that she complete and return the enclosed financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

Appellant submitted a Form OWCP-20 she completed on November 21, 2014 and requested waiver of recovery of the overpayment. She participated in a telephone conference on May 19, 2015 with an OWCP claims examiner.

In a May 19, 2015 decision, OWCP found that appellant received a \$39,904.20 overpayment of compensation for the period January 18, 2005 to November 2, 2008 again noting that she was paid compensation for this period "using the incorrect weekly pay rate of \$847.36 instead of the correct weekly pay rate of \$604.62, after returning to work on

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<sup>4</sup> Docket No. 09-1758 (issued April 13, 2010). The facts set forth in the Board's prior decision are incorporated herein by reference.

<sup>5</sup> OWCP provided figures for the amount appellant received from January 18, 2005 to November 2, 2008 at the weekly pay rate of \$847.36 and the amount she would have received for this period at the weekly pay rate of \$604.62.

November 3, 2008.”<sup>6</sup> It found that she was at fault in creating the overpayment, thereby precluding waiver of the overpayment.<sup>7</sup>

### **LEGAL PRECEDENT**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>8</sup> Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”<sup>9</sup>

In deciding matters pertaining to a given claimant’s entitlement to compensation benefits, OWCP is required by statute and regulation to make findings of fact.<sup>10</sup> OWCP procedures further specify that a final decision of OWCP “should be clear and detailed so that the reader understands the reason for the disallowance of the benefit and the evidence necessary to overcome the defect of the claim.”<sup>11</sup> These requirements are supported by Board precedent.<sup>12</sup>

### **ANALYSIS**

The Board finds that OWCP did not meet its burden to establish that appellant received a \$39,904.20 overpayment of compensation. OWCP did not provide appellant an adequate explanation of how it determined that she received a \$39,904.20 overpayment of compensation. In its October 30, 2014 preliminary determination and May 19, 2015 decision, it indicated that appellant received a \$39,904.20 overpayment of compensation during the period January 18, 2005 to November 2, 2008 because she received compensation based on an incorrect pay rate. However, OWCP did not provide an adequate explanation for this determination. It did not

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<sup>6</sup> OWCP again provided figures for the amount appellant received from January 18, 2005 to November 2, 2008 at the weekly pay rate of \$847.36 and the amount she would have received for this period at the weekly pay rate of \$604.62.

<sup>7</sup> OWCP indicated that it would “deduct the amount of \$39,904.20 from future compensation payments,” but as recovery from continuing compensation benefits under FECA is not involved in this case, the Board has no jurisdiction over the method of recovery of the \$39,904.20 overpayment. *See Levon H. Knight*, 40 ECAB 658, 665 (1989).

<sup>8</sup> 5 U.S.C. § 8102(a).

<sup>9</sup> *Id.* at § 8129(a).

<sup>10</sup> *Id.* at § 8124(a) provides that OWCP “shall determine and make a finding of facts and make an award for or against payment of compensation.” 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP “shall contain findings of fact and a statement of reasons.”

<sup>11</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5c(3)(e) (February 2013).

<sup>12</sup> *See James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

provide a description of how it calculated the proper pay rate for the period January 18, 2005 to November 2, 2008 or how this would have affected appellant's entitlement to compensation for this period.

The record contains an OWCP fiscal payment worksheet completed on June 13, 2014 in which it was reported that appellant was paid based on a weekly pay rate of \$847.36 for the period January 18, 2005 to November 2, 2008. The worksheet also contains a calculation regarding how much appellant would receive for the period January 18, 2005 to November 2, 2008 if the payments were based on a weekly pay rate of \$604.62 per week. It was noted, without explanation, that appellant was only entitled to a weekly pay rate of \$604.62 per week. The document lists appellant's date-of-injury pay rate as \$13.39 per hour, and lists night differential as \$10.64 per week, Sunday premium pay as \$33.40 per week, and holiday pay as \$23.18 per week. However, the document does not contain any explanation about the sources of these figures or how they might have been used to calculate appellant's pay rate.

As noted above, in deciding matters pertaining to a given claimant's entitlement to compensation benefits, OWCP is required by statute and regulation to make findings of fact.<sup>13</sup> In the absence of further findings and reasoning, it has not justified its determination that appellant received a \$39,904.20 overpayment of compensation. Under the present circumstances, appellant would not understand the precise defect of her claim and the kind of evidence, which would tend to overcome it.<sup>14</sup>

### CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment in the amount of \$39,904.20.

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<sup>13</sup> See *supra* note 10.

<sup>14</sup> Given the Board's finding that OWCP did not establish that appellant received a \$39,904.20 overpayment of compensation, it is not necessary to consider whether OWCP properly found that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 19, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 6, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board